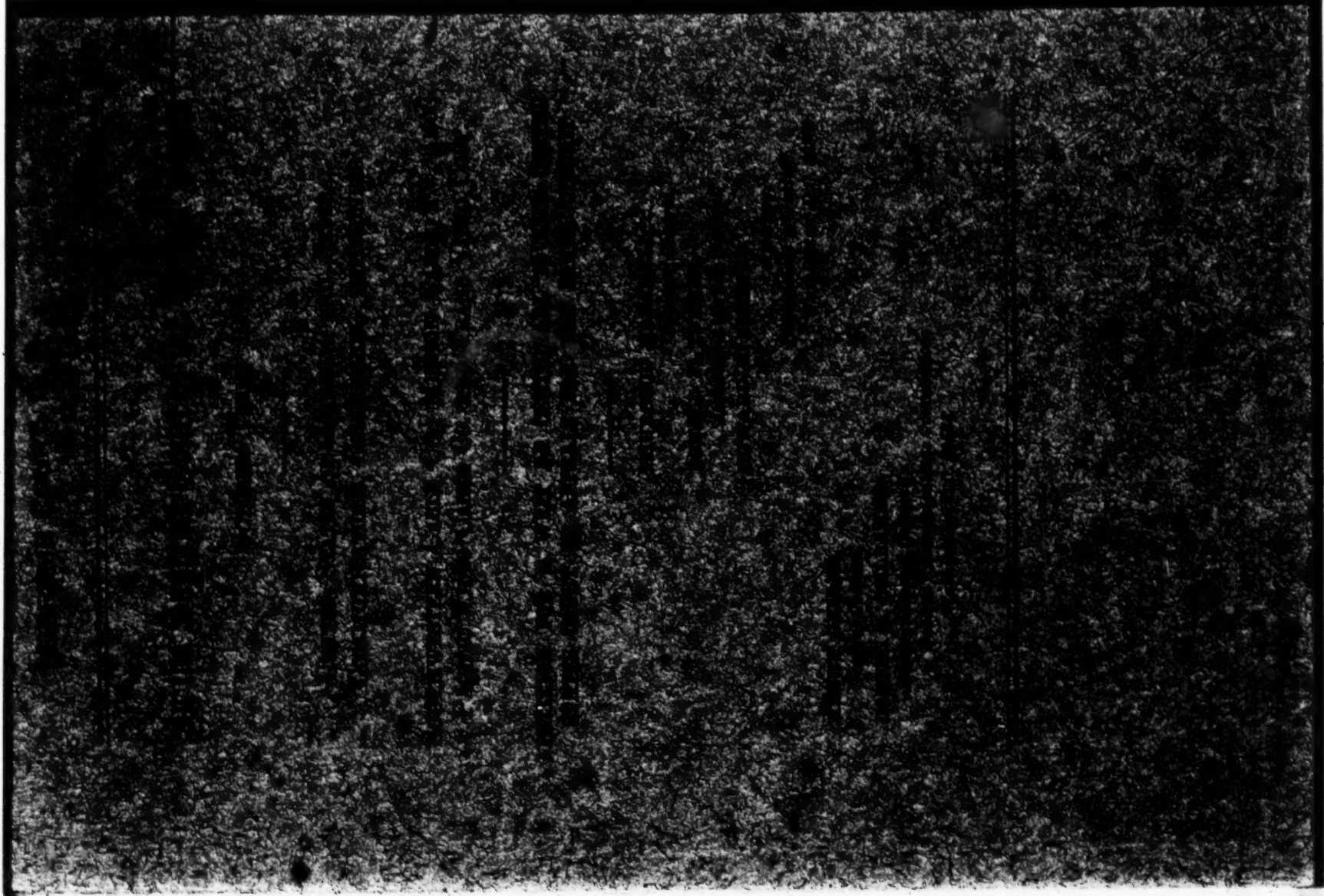

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
A. Background	3
B. The present case	8
Reasons for granting the writ	10
Conclusion	20a
Appendix A	21
Appendix B	31
Appendix C	33
Appendix D	66
Appendix E	80
Appendix F	85

CITATIONS

Cases:

American Trucking Ass'ns, v. *Atchison, T., & S.F. R. Co.*, Nos. 57, 59, 60, 1966 Term, decided May 29, 1967 — 17

American Trucking Ass'ns v. *United States*, 344 U.S. 298 — 13, 16

Buckeye Cablevision, Inc. v. *Federal Communications Commission*, No. 20274, C.A.D.C., decided June 30, 1967 — 11, 13, 15

Carter Mountain Transmission Corp. v. *Federal Communications Commission*, 321 F. 2d 359, certiorari denied, 375 U.S. 951 — 15

Clarksburg Publishing Co. v. *Federal Communications Commission*, 225 F. 2d 511 — 6

Federal Radio Commission v. *Nelson Bros. Bond and Mortgage Co.*, 289 U.S. 266 — 12

Federal Trade Commission v. *Dean Foods Co.*, 384 U.S. 597 — 20

289-328 O—67——1

Cases—Continued

	Page
First Report and Order, 38 F.C.C. 683	4
Fisher's Blend Station, Inc. v. *State Tax Commission*, 297 U.S. 650	12
R. A. Holman & Co., Inc. v. *Securities and Exchange Commission*, 299 F. 2d 127, certiorari denied, 370 U.S. 911	18, 19
Idaho Microwave, Inc. v. *Federal Communications Commission*, 352 F. 2d 729	12
Logansport Broadcasting Corp. v. *United States*, 210 F. 2d 24	18
Memorandum Opinion and Order, July 25, 1966, 4 F.C.C. 2d 612	9
National Broadcasting Co. v. *United States*, 319 U.S. 190	13, 14
Philadelphia Television Broadcasting Co. v. *Federal Communications Commission*, 359 F. 2d 282	11
Regents v. *Carroll*, 338 U.S. 586	10, 14, 15
Securities and Exchange Commission v. *Chenery Corp.*, 332 U.S. 194	18, 19
United States v. *Storer Broadcasting Co.*, 351 U.S. 192	13, 18
Valley Vision, Inc. v. *United States*, C.A. 9, Nos. 21869 and 21870, (order of June 29, 1967)	16

Statutes and rules:

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*:

47 U.S.C. 151	2, 11
47 U.S.C. 152(a)	2, 12
47 U.S.C. 153(a)	2, 12
47 U.S.C. 153(e)	2
47 U.S.C. 154(i)	2, 10, 12, 13, 14, 20
47 U.S.C. 301	2
47 U.S.C. 303(f)	2
47 U.S.C. 303(g)	14
47 U.S.C. 303(h)	2, 4, 12
47 U.S.C. 303(r)	2, 10, 12, 13, 14, 20
47 U.S.C. 303(s)	2, 5
47 U.S.C. 307(b)	2, 4, 12
47 U.S.C. 312	18, 19
47 U.S.C. 312(b)	2, 16

Statutes and rule—Continued

Rules of the Federal Communications Commission, 47 C.F.R. 74.1101 *et seq.*:

	Page
Section 74.1101(a)	3
Section 74.1107	7, 9, 16, 18
Section 74.1107(d)	7, 9
Section 74.1109	8, 9, 16, 18

Miscellaneous:

H. Rep. No. 1559, 87th Cong., 2d Sess	5
S. Rep. No. 1526, 87th Cong., 2d Sess	5

In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on April 28, 1967.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 21–30) is unreported. The Commission's memorandum opinion and order (App. C, *infra*, pp. 33–65) is reported at 4 F.C.C. 2d 612.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 31–32) was entered on April 28, 1967. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has jurisdiction to regulate non-microwave community antenna television (CATV) systems.

2. Assuming an affirmative answer to the first question, whether in the exercise of such jurisdiction the Commission has power to issue an interim order maintaining the status quo pending a hearing to determine the economic impact on local free television of distribution by a CATV system of television signals from other areas of the country.

STATUTES INVOLVED

Sections 1, 2(a), 3(a), 3(e), 4(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, 152(a), 153(a), 153(e), 154(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b) are set forth in Appendix E, *infra*, pp. ~~80-84~~ 81-85.

STATEMENT

This case arises out of an order of the Federal Communications Commission requiring respondents, operators of three community antenna television (CATV) systems in San Diego, California, to limit the growth of their systems while the Commission conducted a hearing to determine whether their further expansion would have an adverse economic effect on free television service in San Diego. The Commission acted under a comprehensive set of rules it

adopted to regulate the use of television broadcast signals by CATV systems while it explores the economic effect of CATV on free television in major markets. *Second Report and Order,* 2 F.C.C. 2d 725 (R. 49).[1] In a decision casting serious doubt on the Commission's authority over CATV generally, the Ninth Circuit held that the Commission lacks the statutory authority to issue such interim orders.

A. BACKGROUND

A CATV system picks up television signals by means of high antennae located at a point of good reception, amplifies them and carries them into a community by means of cable or microwave transmission, and then distributes them by cable to the homes of individual subscribers who pay a monthly fee and, commonly, an initial installation charge.[2] In most

[1] "R." refers to respondents' Appendix in the court of appeals, ten copies of which have been lodged with the Clerk of the Court.

[2] The Commission's rules define a community antenna television system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such terms shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." 47 C.F.R. 74.1101(a), 2 F.C.C. 2d at 801 (R. 125).

communities the systems are locally franchised.[3] CATV originated to bring television to communities not being served because of remoteness or terrain, and to offer multiple television service to areas not enjoying it. Early CATV systems customarily offered three channels, but newer systems generally have a twelve-channel capacity, and twenty-channel systems are being projected for the future. Some systems now distribute signals hundreds of miles from their points of origin. Latest estimates place the number of systems in operation at over 1,800, with some 1,600 systems franchised but not yet in operation, and over 2,400 applications pending in 1,200 cities. While franchises were initially obtained only in underserved communities of small or modest size, CATV franchises are now being sought or have already been obtained in the largest cities. *Second Report and Order,* Par. 117, 2 F.C.C. 2d at 771–772 (R. 95).

This rapid development directly affected the allocation of television service established by the Commission in carrying out its responsibility to license use of the radio band and to fix the zones to be served by stations. 47 U.S.C. 303(h), 307(b). In a comprehensive rule-making proceeding, (*Second Report and Order,* 2 F.C.C. 2d 725 (R. 49)) the Commission Concluded that it has jurisdiction over CATV.[4] It found

[3] The distribution cable facilities are usually located on electric power or telephone utility poles, and easements and rights-of-way to use streets and alleys are often obtained from the governing bodies of the municipalities involved. A percentage fee is frequently paid to such municipalities for CATV franchises.

[4] The Commission first asserted jurisdiction over CATV systems using microwave transmission—which requires a license. *First Report and Order,* 38 F.C.C. 683. On April 23, 1965, the

that importation by CATV of multiple signals into a community may have a severe economic impact upon local stations offering free television service, particularly small, independent stations operating in the UHF band.[5] Its report noted that CATV's offer to the viewer of a choice of multiple programming derived from distant signals could fragment a local station's audience, impairing its ability to earn advertising revenues and thus threatening its ability to serve the local community. Moreover, CATV cannot economically extend its lines to rural areas; it does not serve those who cannot afford its monthly fees and installation charges; and it does not offer a forum for the expression of views on matters of local interest. By potential-

---

Commission issued a Notice of Inquiry and Notice of Proposed Rule Making in which it tentatively concluded that it had jurisdiction over all CATV systems, whether they use licensed microwave or only cable. 1 F.C.C. 2d 453 (R. 4–46). After receiving voluminous comments, it released its *Second Report and Order*, on March 8, 1966. A few State public utilities commissions have been given or have determined that they have jurisdiction over some of the intrastate aspects of CATV. Generally, however, until the Commission acted in 1966, CATV systems were, as a general matter, substantially unregulated.

[5] In the larger markets, UHF (ultra high frequency—channels 14–83) stations typically offer non-network commercial or educational programming but serve much smaller audiences than VHF (very high frequency—channels 2–13) stations. Many home sets are not equipped to receive UHF and it is somewhat harder to focus. In order to promote the development of multiple television service through local UHF stations, Congress in 1962 passed all-channel receiver legislation. 76 Stat. 150, 47 U.S.C. 303(s). See H. Rep. No. 1559, 87th Cong., 2d Sess., 2–6; S. Rep. No. 1526, 87th Cong., 2d Sess., 2–5. This statute authorized the Commission to require that all television receivers sold in interstate commerce be equipped to receive UHF signals, and the Commission promptly acted under that authorization.

ly impairing the viability of free local broadcasting in a community, CATV might reduce or deny service to many viewers.

Information available, however, did not permit the Commission to adopt general rules permanently regulating the growth of CATV as a part of the nation's television system. The Commission concluded that it would not be in the public interest for CATV to become entrenched in the larger television markets while its effect on the survival of broadcasting in the communities involved was uncertain. It therefore proposed to examine the effect of CATV on a case-by-case basis. While establishing some general rules (see note 8, *infra*), the Commission nevertheless stated (Par. 121, 2 F.C.C. 2d at 773, R. 97): "The plain fact is that on the record before us, it is not possible to give a definitive answer to the future growth of CATV—to whether it will achieve very substantial penetration in the major markets and, correspondingly, to what its impact will be upon UHF developments in these markets," and concluded (Par. 126, 2 F.C.C. 2d at 776, R. 100):

> * * * We must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, "Oh well, so sorry that we didn't look into the matter."

Specifically, the Commission determined that there

should be full exploration, in an evidentiary hearing, of the impact of any new proposed CATV system bringing signals from beyond the Grade B contour of the originating station into the Grade A service area of any station in a community in one of the largest one hundred television markets.[6] Section 74.1107 of the rules (App. F, *infra*, pp. ~~85–87~~ 87–89) was adopted to effectuate this determination. That regulation requires a hearing before a CATV system may bring a distant signal into any community within the Grade A service area of a television station in one of the top 100 markets. A grandfather provision in the rule (Section 74.1107(d)) stipulates that this general requirement does not apply to any signal which was being supplied by a CATV system to its subscribers on or before February 15, 1966.[7] There is, however, a proviso to the effect that, whatever the scope of its existing franchise, a grandfathered system shall not extend its service into "new geographical areas" if the Commission finds, upon petition filed by a television broadcast station or other interested person in the area, that such extension of service is contrary to the public

---

[6] A station's Grade B contour is the imaginary line upon which a good picture may be expected 90 percent of the time at the best 50 percent of the locations. The Grade A contour defines the area at the perimeter of which a good picture is received 90 percent of the time at the best 70 percent of the locations. See *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 511, 515–516 n. 12 (C.A.D.C.).

[7] On February 15, 1966, the Commission had released a Public Notice in which it announced that new rules would shortly be adopted to apply to non-microwave CATV systems, as well as those using microwave, and announcing that February 15 would be the "grandfathering" date.

interest. The proviso also authorizes temporary relief pending a hearing (App. F, *infra*, p. 87):

> The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

Finally, recognizing that in this new and rapidly developing field it could not deal in advance with every potential area of concern, the Commission, in Section 74.1109 (App. F, *infra*, pp. 87-89), made provision for special situations which would justify relief from the requirements of the rules or which would require imposition of "additional or different requirements" on an *ad hoc* basis. Here again, temporary relief pending hearings was authorized. One relatively rare situation identified by the Commission as appropriate for such individualized consideration is that in which two major markets are so located that the Grade B contour of a station in one overlaps that of one or more in the other (*e.g.*, Washington and Baltimore.)[8] 2 F.C.C. 2d at 786, n. 69 (R. 110).

B. THE PRESENT CASE

Respondents operate three CATV systems in San Diego, California, the 54th largest television market

[8] In addition to the rules discussed above, the Commission also adopted rules which require CATV systems (1) to carry local stations, and (2) to refrain from duplicating locally broadcast programs by bringing in on the same day distant signals carrying the same program. These provisions are not involved here.

in the United States. They have grandfather rights under the Commission's rules and presently carry between six and eight Los Angeles television stations into various sections of San Diego. Local broadcast service now operating in San Diego consists of two VHF television stations (KFMB–TV, (CBS) and KOGO–TV (NBC)) and one UHF station (KAAR).[9] Midwest Television, Inc., licensee for KFMB–TV, filed a petition with the Commission under Section 74.1107 (d) of the rules alleging that respondents were expanding rapidly into new geographical areas, that the viability of local broadcasting was being threatened, and that this expansion should be limited. Respondents claimed that they were not extending Los Angeles signals in violation of Section 74.1107 because San Diego is within the Los Angeles stations' Grade B contour and that in any event respondents' grandfather rights permitted them to expand. Without deciding the Grade B contour issue, the Commission held that this case might be one requiring the imposition of "additional or different requirements" under Section 74.1109. It therefore set the matter down for hearing under that rule. To avoid entrenchment of the systems and possible disruption of service to subscribers in the new geographical areas in question, the Commission provided (in Pars. 24–26 of its decision) for an interim order limiting expansion of the systems during the pendency of the hearing. Respondents could continue

[9] The Commission has issued a construction permit for another UHF station and an application is pending for a noncommercial UHF educational station. The area is also served with ABC network programs by a VHF station in Tijuana, Mexico.

full service to all current subscribers and were permitted to extend their lines, but they were barred from carrying Los Angeles signals into new geographical areas. *Memorandum Opinion and Order,* July 25, 1966, 4 F.C.C. 2d 612 (App. C, *infra,* pp. 56–58).

Respondents petitioned the court of appeals for review of the interim restriction, contending that temporary relief of this kind is not authorized by the Communications Act.[10] The court of appeals set aside the Commission's order insofar as it granted interim relief, expressly stating that it was not deciding any of the other questions presented (App. A, *infra,* p. 29). More broadly, however, it held that the order was not justified by the Commission's general rule-making authority under Sections 4(i) and 303(r) of the Communications Act (47 U.S.C. 154(i) and 303(r)) because these provisions "are to be measured by the Act and its structure and purpose" (App. A, *infra,* p. 25). Citing *Regents* v. *Carroll,* 338 U.S. 586, the court below ruled that the Commission's powers with respect to the regulation of broadcasting are limited to the licensing of stations and related functions, explicitly stating that "sections 4(i) and 303(r) are limited to the scope of the Commission's licensing authority" (App. A, *infra,* p. 29). Since non-microwave CATV systems are not licensed activities, the Commission, in the court's view, lacked authority to prevent respondents from expanding pending the hearing it had ordered.

---

[10] In addition, respondents Trans-Video, Mission and Pacific urged, *inter alia,* that the Commission lacked jurisdiction to regulate CATV systems; that its regulations violated the First Amendment; and that the rule invoked by the Commission was invalid because it was adopted without adequate notice.

REASONS FOR GRANTING THE WRIT

Although the court of appeals set aside only that part of the Commission's order which directed maintenance of the status quo pending a hearing, it did so on grounds which cast serious doubt on the Commission's jurisdiction to regulate any aspect of non-microwave CATV. In view of CATV's burgeoning growth, the court's holding that the Commission's authority in the broadcast area is limited to the regulation of radio and television licensees presents a question of far-reaching legal and practical importance.

The court's decision unduly restricts the Commission's ability to carry out its congressionally prescribed function under the Communications Act. It is, moreover, in direct conflict with a decision of the Court of Appeals for the District of Columbia Circuit holding that the Commission has jurisdiction over non-microwave CATV. *Buckeye Cablevision, Inc.* v. *Federal Communications Commission,* C.A.D.C. No. 20274, decided June 30, 1967 (App. D, *infra,* pp. 66-70).

Effective administration of the Communications Act also requires resolution of the subsidiary question whether the Commission has power to maintain the status quo in a particular market by an interim order while it explores the economic impact of CATV in that area. Such ancillary authority is essential to the effective and meaningful exercise of the Commission's jurisdiction over CATV and is, we believe, fully consistent with the statutory scheme.

1. The Commission's jurisdiction to regulate CATV is based upon the language, structure and purpose of the Communications Act, 47 U.S.C. 151 *et seq.* As reflected in the Commission's comprehensive discus-

sion of its jurisdiction in the *Second Report and Order,* 2 F.C.C. 2d 725, 728–734, 793–797 (R. 52–58, 117–121), it does not claim licensing authority over non-microwave CATV. But the scope of the Commission's regulatory authority under the Communications Act is not confined solely to certificated common carriers and broadcast licensees.[11] It extends "to *all* interstate and foreign communication by wire * * * and to all persons engaged within the United States in such communication," 47 U.S.C. 152(a) (emphasis added). Community antenna systems come squarely within this definition: wire communication within the meaning of the Act (47 U.S.C. 153(a)) is plainly involved, and extension of the transmissions of television stations is in interstate commerce whether or not the extension itself occurs entirely within one state. *Idaho Microwave, Inc.* v. *Federal Communications Commission,* 352 F. 2d 729 (C.A.D.C.). Cf. *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Co.,* 289 U.S. 266; *Fisher's Blend Station, Inc.* v. *State Tax Commission,* 297 U.S. 650.

Because CATV intercepts and extends television signals it bears a uniquely close relationship to the Commission's responsibility for providing, through licensing use of the radio band, a fair and equitable allocation of radio service across the country (47 U.S.C. 307(b)); and to the Commission's authority to establish the area or zone to be served by each station (47 U.S.C. 303(h)). In view of the grave economic

[11] Cf. *Philadelphia Television Broadcasting Co.* v. *Federal Communications Commission,* 359 F. 2d 282 (C.A.D.C.), which held that the Commission was not required to regulate CATV systems as common carriers.

impact which, the Commission found, CATV may in some circumstances have on the viability of licensed broadcasting in a community, and the fact that CATV is wire communication subject to the Act, there is ample authority for the Commission to use its general rule-making powers under Sections 4(i) and 303(r) (47 U.S.C. 154(i) and 303(r)) to prevent frustration of the legislative purpose to achieve a fair and equitable allocation of television service.

The scheme of regulation created by the Act is designed to meet new developments in the continuously evolving uses of radio and television. Both with respect to technological and economic regulation the Commission is given flexible, comprehensive and expansive powers "to promote and realize the vast potentialities of radio. * * *" *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217; see *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203. Thus, with respect to the Commission's rule-making powers, Section 4(i) contains a broad grant of authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Section 303(r) similarly grants authority "[e]xcept as otherwise provided in this Act * * * from time to time, as public convenience, interest, or necessity requires * * *" to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *." These are not merely housekeeping provisions, but constitute affirmative grants of power, *United States* v. *Storer Broadcasting Co., supra*, at 202–203, "coterminous with the scope of

agency regulation," *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 309–311.

All of this was plainly recognized in *Buckeye Cablevision, Inc.* v. *Federal Communications Commission, supra,* which decision squarely conflicts with the decision below. In *Buckeye,* the Commission issued a cease-and-desist order to compel a CATV system in Toledo, Ohio, to obey the distant signal rules. On petition for review the Court of Appeals for the District of Columbia Circuit held that the Commission has ample power to issue and enforce such rules, and that in doing so it had "chosen an eminently reasonable course. The growth of CATV is so rapid that, if it is allowed to proceed unabated, harm to the regulatory scheme can occur before the Federal Communications Commission can act" (App. D, *infra,* p. 71).

Whatever the merits of the particular rules adopted—a question not presented by this case—we think it clear that the Commission has authority to regulate CATV operations. The restrictive approach adopted by the court below—that the Commission's rule-making powers under Sections 4(i) and 303(r) are limited to broadcast licensees—would defeat the comprehensive purposes of the Act to "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g)), and "to secure the maximum benefits of radio to all the people of the United States. * * *" *National Broadcasting Co.* v. *United States, supra,* at 217. As *Buckeye* makes clear, the Commission's powers are not "rigidly compartmentalized into 'licensing' and 'public utility regulation' functions" (App. D, *infra,* p. 73, n. 19). See

Carter Mountain Transmission Corp. v. *Federal Communications Commission,* 321 F. 2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951. Those powers extend, and must necessarily extend, if the Commission is to regulate effectively, to all conduct by persons subject to the Act which, as in the case of CATV, directly relates to and affects broadcasting.

Regents v. *Carroll,* 338 U.S. 586, does not support the restrictive reading of the Act adopted below. In that case a station whose license had been renewed by the Commission on condition that it repudiate a contract that had effected an improper delegation of control, was ordered by a State court to make a payment under the contract. This Court held that the station's defense of impossibility, based on the condition in its license, was a matter of State law. The Court noted that the Commission's remedial powers under the Act as it then stood were centered around its licensing functions. But the *Regents* holding does not in any event "bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory scheme." *Buckeye Cablevision, Inc.* v. *Federal Communications Commission, supra* (App. D, *infra,* p. 73).

The decision below has cast an ominous cloud over the Commission's entire CATV regulatory program.[12]

[12] After the decision of the court below, respondents moved to terminate the Commission's hearing on the ground that under the court of appeals' decision the Commission is barred from imposing any restriction or limitation on the operations of their CATV systems. The Commission denied the petition on the ground that, whatever the rationale of the decision and the

At present, the Commission is engaged in literally hundreds of proceedings to apply its rules, grant waivers or impose special requirements.[13] Moreover, approximately 23 cases involving the CATV rules are pending in the courts of appeals; 11 of these challenge the Commission's jurisdiction over CATV (App. G, *infra*, pp. ~~90-92~~ 93-95). Resolution of the jurisdictional question by this Court will dispose of a mass of judicial and administrative litigation and settle an issue of great public importance.

---

language of the opinion, the court's *judgment* was in terms limited to the power to issue interim orders. Since disagreeing with the court's decision and then in the process of preparing to seek review in this Court, the Commission focused on the judgment, instead of the rationale and opinion, of the court below in denying the petition. That the Commission so proceeded does not mean that it is committed to a narrow view of that decision, nor that it impaired its ability to seek review of the broad rationale on which that decision was grounded.

The Ninth Circuit has recently indicated a broad reading of its decision here by citing the instant case as sole authority in staying a cease-and-desist order against violation of the CATV rules. *Valley Vision, Inc.* v. *United States*, C.A. 9, Nos. 21869 and 21870 (order of June 29, 1967). Since no interim order was there involved and the Commission has express authority to issue cease-and-desist orders (47 U.S.C. 312(b)), it is apparent the court believes that the Commission has no jurisdiction over non-microwave CATV. Similar attacks on the Commission's jurisdiction, based on the decision below, have been filed in many other pending Commission proceedings.

[13] As of June 15, 1967, approximately 272 pleadings have been filed under the Commission's distant-signal rules (Section 74.1107) requesting hearings or waivers. The Commission has disposed of 90 and 182 are pending. Under the Commission's "additional or different requirements rule" (Section 74.1109), approximately 390 proceedings have been filed. The Commission has disposed of 150 (including 26 cease-and-desist proceedings) and 234 are pending.

2. If the Commission has jurisdiction to regulate CATV systems, that power must encompass all that is necessary to prevent frustration of the Act's purposes. *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 311. The power to issue interim orders to maintain the status quo while the Commission investigates the impact of CATV in particular markets is not merely useful; it is indispensable to the Commission's effective performance of its statutory responsibilities.

CATV presents novel problems; neither the Commission nor the industry has yet been able to fully assess the impact which this new development may have on broadcasting. The thrust of the Commission's rules, therefore, is not to prevent the development of CATV but to permit the examination, on an *ad hoc* basis, of its effect on particular markets and on the Commission's allocation of television service throughout the country. It seems plain that "* * * this kind of flexibility and adaptability to changing needs and patterns * * * is an essential part of the office of a regulatory agency." *American Trucking Ass'ns* v. *Atchison, T. & S.F. R. Co.*, Nos. 57, 59, 60, 1966 Term, decided May 29, 1967 (slip op., p. 18). But such an examination could be completely frustrated if CATV systems were to mushroom in the very markets under study while the Commission was proceeding to ascertain the facts and make informed determinations. Unless the status quo is maintained in the interim, the Commission's investigation may be mooted by a *fait accompli*.[14] As the Com-

[14] If the Commission lacks power to maintain the status quo in aid of its jurisdiction over CATV pending a hearing, its only recourse, should it eventually determine that expansion should not, in the public interest, be permitted, would be the quite unde-

mission stated (*Second Report and Order*, Par. 140, 2 F.C.C. 2d at 781–782, R. 105–106):

> It is important, we think, to exercise [our] jurisdiction with respect to CATV operations in the major markets, so as to insure that such operations will be consistent with the public interest. And to accomplish this, it is necessary to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest.

The same considerations apply whether the status quo is to be maintained by a general rule (as in Section 74.1107) restricting new franchises in the top 100 markets pending a hearing, or by *ad hoc* rulings tailored under Rule 74.1109 to the facts of the particular case, as here. This is precisely the kind of situation in which the Commission may proceed either by a general rule or by particular order. Compare *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202, with *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205; cf. *Logansport Broadcdsting Corp.* v. *United States*, 210 F. 2d 24, 27 (C.A.D.C.). Indeed, there can hardly be complaint because here the status quo is maintained, not automatically, by operation of law, but, rather, by special order, entered after notice and upon consideration of the particular circumstances. Stated differently, in the kind of situation here involved the Commission has

---

sirable and rather infeasible one of requiring removal of already installed systems.

determined to proceed on an *ad hoc* basis rather than to prescribe by general rule a requirement for a hearing in each and every case. That it could have done so, assuming jurisdiction over CATV generally, seems clear. That it chose rather to adopt a more flexible procedure, and place the burden on interested persons who fear adverse effects from expansion of existing systems to seek the initiation of an inquiry, seems an eminently reasonable course for the Commission to follow in regard to an overlapping Grade B contour sort of situation.[15]

Indeed, the instant case is quite similar to *R. A. Holman & Co., Inc.* v. *Securities and Exchange Commission*, 299 F. 2d 127 (C.A.D.C.), certiorari denied, 370 U.S. 911. There interim action by the SEC suspending a broker's right to deal in exempt securities pending a hearing was sustained under that agency's general regulatory powers. The court noted (299 F. 2d at 131):

> In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance,

[15] Section 312 of the Act, 47 U.S.C. 312, which provides for permanent cease-and-desist orders for violation of the Communications Act or the Commission's rules, is not germane. The court below inferred from the existence of Section 312 that the Commission lacked power to enter an interim order of the kind involved here. Section 312, however, authorizes a sanction, not a device for stabilizing a rapidly changing situation in abeyance while the Commission studies its impact. Here we are dealing with a temporary stay, not a permanent ruling as under Section 312. That critical distinction makes the court below's reliance on Section 312, as a basis for concluding that the Commission lacks the power to issue interim orders, misplaced.

> an official body can take summary action pending a later hearing. * * *

Of course, as *Holman* indicates, the validity of an interim order depends upon a reasonable balancing of public and private interests. Here the Commission found temporary relief to be necessary to prevent consequences potentially adverse to the public resulting from the unfettered growth of respondents' systems while a hearing was in process. Such a determination is one that the Commission is empowered by statute to make, and one which the Commission needs to be able to make in order to carry out the regulatory authority given it by Congress.[16] In concluding that the Commission lacked the authority to enter interim orders to maintain the status quo pending a hearing, and in

---

[16] In this case, the Commission also considered whether it would be appropriate for it to seek an injunction from the court of appeals to preserve its jurisdiction to enter an effective order after hearing, under *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597. 4 F.C.C. 2d at 622, App. C, *infra*, pp. 53–54. It noted, however, that initial consideration of the matter by the Commission followed by judicial review was preferable to immediate resort to the courts on a subject involving the Commission's primary jurisdiction.

Moreover, the existence of administrative power under the Communications Act is an entirely different question from the authority of the courts under the All-Writs Act presented in *Dean*. And in *Dean* it was recognized that the FTC had no statutory authority *itself* to issue injunctions, because of the absence of any provisions in the Federal Trade Commission Act, similar to Sections 4(i) and 303(r) of the Communications Act, conferring such authority on that agency. In addition, the dissent in *Dean* noted (384 U.S. at 618–619) the somewhat different functions performed by the FTC and the Department of Justice in administering Section 7 of the Clayton Act. Under the Communications Act, however, no such enforcement counterpart of the Commission exists.

grounding that conclusion on a lack of jurisdiction over non-licensees such as CATVs, the court below has seriously impaired the Commission's role in protecting the public interest with respect to an important new development—CATV. Review by this Court is thus plainly warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General,
DONALD F. TURNER,
Assistant Attorney General,
HOWARD E. SHAPIRO,
Attorney,
Department of Justice.

HENRY GELLER,
General Counsel,
DANIEL R. OHLBAUM,
Deputy General Counsel,
Federal Communications Commission.

JULY 1967.